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In The
Supreme Court of the United States

ALBERTO R. GONZALES,

Petitioner,

v.

LEROY CARHART, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE FAMILY RESEARCH COUNCIL AND FOCUS ON THE FAMILY IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Family Research Council (hereinafter "FRC") is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation.

FRC's legal and public policy experts are continually sought out by federal and state legislators for assistance and advice. FRC has participated in numerous *amicus curiae* briefs in the United States Supreme Court, lower federal courts, and state courts.

FRC represents thousands of constituents in its efforts to protect the institutions of marriage and family in federal and state law.

Focus on the Family (hereinafter "FOF") is a non-profit communications and educational organization dedicated to the preservation of marriage, parenting, and the nurturing home. FOF produced a number of national and international radio broadcasts on family and cultural issues, publishes a number of magazines for family members of various ages and stages and a wider range of books as well as a website: family.org.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

Millions of families in America and abroad rely on FOF for help in understanding the dynamics of their own family as well as what is happening with the family culturally and how they help strengthen both.

SUMMARY OF ARGUMENT

The Eighth Circuit correctly focused on the absence of a "health exception" to the Partial-Birth Abortion Ban Act of 2003 (hereinafter, "the Act").[2] The court recognized that resolving this constitutional question depended upon the degree of deference which courts owe to Congressional findings of fact.

However, the Eighth Circuit accorded Congress' finding no deference at all. The court distorted what Congress found, misunderstood this Court's precedent on partial-birth abortion (*Stenberg v. Carhart*),[3] and finally eviscerated the whole doctrine of judicial deference, reducing it (literally) to a nullity. A sound understanding of these matters requires that the judgment below be reversed.

First, regarding Congress' findings on medical necessity, the court below improperly substituted its own factual evaluation. Second, the Eighth Circuit mistakenly focused upon the findings about medical necessity. A glance at the Act shows that Congress made a second set of findings, which findings are dispositive of this lawsuit *regardless* of how the medical necessity issue is resolved. Congress

[2] Pub. L. No. 108-105, 117 Stat. 1201.

[3] 530 U.S. 914 (2000).

found that partial-birth abortion is so close to infanticide that the line between it and abortion is "blur[red]." Congress found that the "disturbing similarity" of partial-birth abortion "to the killing of a newborn infant promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure."

These findings should be accepted by the courts. These findings are precisely the type of judgments that Congress makes better than do courts. Nothing in *Roe v. Wade*[4] implies that Congress may not make these judgments or that courts should not defer to them. Nothing in *Stenberg v. Carhart* does, either. And it is easy to "perceive a basis" for Congress' judgment, as this Court's relevant standard of judicial review requires.

ARGUMENT

I. The Eighth Circuit Arbitrarily Refused to Defer to Congress' Finding That Partial-Birth Abortion Is Never Medically Necessary.

The Eighth Circuit freed itself of the Congressional findings expressed in the Act and this Court's holdings about the deference due to them by an intellectual trick.

The court first recognized that this Court's decisions required it to accord substantial deference to Congress when Congress engaged in what is usually called "legislative fact finding." The court below said that its "sole obligation" was to see if Congress drew "reasonable inferences

[4] 410 U.S. 113 (1973).

based on substantial evidence."[5] The court further recognized that whether a partial-birth abortion was medically necessary in a given case was a question of fact. "[I]n any given instance it would be either true or false" whether there was a medical need. The court allowed that there may be "conflicting expert opinions, but only one can actually be right in any given set of medical circumstances."[6] The court implicitly conceded, too, that it would be bound by the judgment of Congress if the question about whether there were no cases of "medical necessity" was indeed a question of fact.[7]

Congress declared effectively that it had considered all known conditions in which a claim of medical necessity for partial-birth abortion had or might be raised. Congress examined *seriatum* the evidence and opinions about each instance. Congress formed a judgment about each condition, until the universe of medical conditions for which a partial-birth abortion is said to be indicated was exhausted.[8] Congress thus aggregated all the "given instance[s]" of what the Eighth Circuit deemed to be, each

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[5] *Carhart v. Gonzales*, 413 F.3d 791, 797 (8th Cir. 2005).

[6] *Id.*

[7] *Id.*

[8] This is the implication of Congress' findings. *Amici* do not make any claim here about the activities of any particular Congressman. We do not make the fantastic claim that each, or that any, individual Congressman reviewed the whole medical portfolio containing the alleged health benefits of partial-birth abortion. The textual assertion rather pictures the accomplishments of Congress as such: several hundred members' acts of cooperation, one with the others, which acts are spread over a period of years and many separate hearings and debates. It is exactly this kind of cooperation and division of labor which this Court has pointed to as Congress' great advantage over the judiciary when it comes to fact-finding on a large scale.

considered separately, a question of fact. Congress judged the whole set of such instances to be barren of cases of medical necessity. This wider and inclusive judgment Congress called a matter of "fact." *And so it must be.*

Any aggregation of individual instances of a certain fixed character *has to be* a set of exactly the same fixed character. There is no other logical possibility. Consider this illustration from outside the courtroom. Five sets of human remains are discovered at a crash site on a remote Andean hillside. The bodies are so badly decomposed that no one can tell whether they are members of a long-lost B-52 crew. There is evidence as to each set of remains that he was a member of the crew, and there is evidence that he was not. Upon close forensic examination, including inspection of dental records and the remains, competent authority determines that neither the first one examined, nor the second, nor the third, fourth, or fifth served on the lost bomber. It is *necessarily* true, then, that there were no remains of any B-52 flyer at the crash site. This is *necessarily* true even though it is still the case that there is substantial evidence for concluding that the remains are indeed the crew's: the bodies are in military uniforms, appear to have been the age and nationality of the lost flyers, and so on. These reasons for concluding differently remain in place. But they are *defeated* by the judgment of the competent authority.

Now consider an illustration from inside the courtroom. If an appellate court in a libel case carefully examines each of three allegedly defamatory passages in a newspaper article, and concludes that the first is a protected expression of opinion and not of fact, the second to the same effect, and so the third, then inevitably the whole set of passages is about opinion, not fact.

Thus, if the first instance of *claimed medical need for a partial-birth abortion* is shown to be *false as a matter of fact,* and the second such instance is also shown to be *false* as a matter of fact, and so on in the third, fourth, fifth instances until the set of claimed cases of necessity has been exhaustively examined, then the conclusion that there is never a case of medical necessity is necessarily true. And it is necessarily true that the conclusion is a judgment about facts.

The Eighth Circuit did a *jujitsu* move to free itself from the grip of this logic. The court announced that the government "erroneously assum[ed]" that Congress' finding about medical necessity was a judgment about facts.[9] The court said that instead it was a question of "law." The court concluded that the nature of the aggregate was different in kind from the nature of each – and of all – its individual members. "Medical necessity" in given instances was about "fact," but the whole set of given instances was about "law." That is certainly false.

The Eighth Circuit also declared the truth of the aggregated matter to be irrelevant. The court declared that "whether there is a certain quantum of evidence to support a particular answer, not which of the divergent opinions is ultimately correct" is what matters.[10] Thus if "substantial medical authority" favors a "health exception," then there must be a "health exception,"[11] even though Congress declares that view to be false, and even though the Eighth Circuit holds that Congress might be right.

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[9] 413 F.3d at 797.

[10] *Id.*

[11] *Id.*

The Eighth Circuit thus blasted the whole notion of "deference" to smithereens. The court effectively held that the presence of contrary evidence makes the Congressional judgment (that there is never a medical necessity) unreasonable or, at least, not binding. But "deference" makes no sense without disputed evidence; if all the evidence pointed toward one conclusion, everyone who is not irrational would hold that conclusion based upon the evidence, not on the basis of "deferring" to competent authority. The Eighth Circuit said that "deference" does not hold if there is disputed evidence.

The Eighth Circuit's mistake is the one any lawyer or lower court makes when he or she professes to believe in reasoning on the basis of authority – but only when the higher court gets it right. If the putatively authoritative decision is correct, its correctness is a sufficient reason to follow it. There is no need to accept it on the basis of authority. The whole concept of "authority" is irrelevant. What this Court's doctrines about deference to Congressional fact-finding amount to is precisely what the Eighth Circuit denied: "deference" means that the judgment of Congress is a sufficient reason for courts to adhere to that judgment, even if the court doubts that Congress got it right, and even if there is substantial contrary evidence.

Congress recognized that some medical authorities maintain that partial-birth abortions may occasionally be necessary. Congress said in the "Findings" portion of the Act that there was a "consensus" on the matter, not that there was universal agreement. Congress said that the "great weight of the evidence" supported its judgment, not that all the evidence did. Congress offered its conclusions as *correct*, not as uncontested or uncontroversial.

All the cases from this Court supporting deference to Congressional fact-finding leave plenty of room for contrary evidence. The constitutional standard for judicial acquiescence is not where Congress has proved its case beyond a reasonable doubt or by clear and convincing evidence or even by a preponderance of the proof. The standard is rather "perceive a basis"[12] or "rational basis": if a court can detect some evidence for Congress' conclusion, then that conclusion is binding on the court.[13]

II. The Eighth Circuit Mistakenly Asserted That This Court's Holding in *Stenberg v. Carhart* Precluded Deference to Congress' Findings in the Act.

The Eighth Circuit claimed in its defense that it *did* defer to authority – not to the authority of Congress, but to the authority of this Court. The court said that "*Stenberg* requires the inclusion of a health exception whenever 'substantial medical authority' supports the medical necessity of the procedure."[14] There are sentences in *Stenberg* which, if read in isolation, support this contention. But when these sentences are read as they must be –

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[12] *See* footnote 24 *infra*.

[13] The Eighth Circuit gained some rhetorical advantage by focusing on Congress' claims about a "consensus" of relevant opinion. But this focus is misdirected. Congress much more often used expressions consistent with a lack of "consensus" (if by that word is meant no significant dissent). In any event, the important feature of Congressional authority which the Eighth Circuit wholly disregarded is that Congress is entitled to sort through evidence and judge – as it did in the Act – that little or no "credible" evidence supports the claims of medical necessity for partial-birth abortion.

[14] 413 F.3d at 797.

in context and within the litigation posture of that case – it is easy to see that the Eighth Circuit was incorrect.

Though *Stenberg* had to do with partial-birth abortion, it really is a different case entirely. First, *Stenberg* had to do with state law. *This* litigation involves the enactment of a co-equal branch of the national government. In the Act, Congress cited many statements by this Court about Congressional fact-finding competence and the proper judicial deference thereto. But there is no comparable body of precedents about state legislatures. There are good reasons for the discrepancy. One is the long and venerable tradition in American constitutional law about the co-responsibility of Congress for interpreting and applying the Constitution. Many of the cases affirming expansive Congressional authority to find facts to which courts defer involve, moreover, enforcement of the Fourteenth Amendment. By section five, Congress is vested with new lawmaking authority. States are put under obligations and limits by the Fourteenth Amendment. They take no new governmental power. They lose some.

Second, the Nebraska legislature's findings in *Stenberg* were different, much more limited, and less cogently expressed than the findings in the Act. It is no surprise: Nebraska's unicameral fifty person legislature is scarcely equipped to do what Congress can do – and did do – in connection with the Act: call upon a huge staff possessed of outstanding expertise; enjoy the attendance of witnesses from throughout the country; bring to bear the diverse experiences and opinions and judgments of 535 lawmakers from across the land; and act for the common good of the entire republic.

Third, Nebraska's legislators did not have another key source of data which Congress had in considering and passing the Act: all the facts compiled and sorted and discussed in the *Stenberg v. Carhart* litigation, including the decision in this Court.

Fourth, this Court in *Stenberg* did not look at the question of medical necessity straight-on. This Court's expressions were based upon a particular trial court record. Congress is not limited by any judicial record. Its members may rely upon the latest knowledge about partial-birth abortion and medical necessity. Given the dearth of knowledge about these procedures in the 1990's, and the always improving levels of neo-natal and maternal medical care, what was – or may have been – not proved in 1997 might now be proven, as it was to Congress.

Lastly, even though *Stenberg* held that Nebraska's partial-birth abortion law had to have a health exception, this Court's expressions are all suggestive of a more limited, refracted and conditional judgment. Here are two examples: "In sum, Nebraska has not convinced us that a health exception is 'never necessary to preserve the health of women.'"[15]; "The upshot is a District Court finding that D&X [partial-birth abortion] significantly obviates health risks in certain circumstances, a highly plausible record-based explanation of why that might be so . . . "[16]

These expressions can be read in two slightly different ways. On neither reading does the Act conflict with *Stenberg*.

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[15] 530 U.S. at 937-38.

[16] *Id.* at 936-37.

On one reading of *Stenberg*, this Court asserted no judgment of its own about medical necessity. On this first reading, the Court left undisturbed the lower court's conclusions because those conclusions were not "clearly erroneous." Findings which are not "clearly erroneous" might of course be false. On this reading the Supreme Court could actually have silently *agreed* with Nebraska that there are no cases of medical necessity. On this reading, the Partial-Birth Abortion Ban Act of 2003 gives this Court a welcome opportunity to implement its – the Court's – judgment that there are no cases of medical necessity. This was, on the first reading, a judgment the Court could not express in *Stenberg v. Carhart* because of the incorrect, though plausible, findings of the District Court.

On this first reading, *Stenberg* is no impediment whatsoever to Congressional fact-finding about medical necessity, save that which presupposes a single District Court judge can bind, for all time, the great coordinate branches of government on a question of fact. One sorely hopes that such questions cannot be settled by who wins the race to the courthouse, and on the luck of the judicial draw on race day.

The second possible reading of *Stenberg* is this: this Court itself is heard to judge the record. On this reading this Court would be saying: "we (along with the District court) do not think Nebraska has made its case, as far as proof in this record goes." This reading of *Stenberg* is not in conflict with the Act, either.

The *Stenberg* Court was inescapably limited to opining upon the record compiled below. That judicial proceeding suffered from all the limitations and comparative

disadvantages identified by Archibald Cox, in his classic article about the comparative virtues of legislative and judicial fact-finding:

> The greater number of members [of a legislature] and their varied backgrounds and experience make it virtually certain that the typical legislature will command wider knowledge and keener appreciation of current social and economic conditions than will the typical court. The legislative committee, especially when armed with able counsel and the power of subpoena, is better equipped to develop the relevant data. Courts have always found it hard to develop the background facts in constitutional cases. Judicial notice often means only intuition or prejudice. Occasionally, special masters have been appointed to make elaborate studies of economic conditions, as where a particular industry has been subjected to novel legislation. A court may hear expert witnesses, but they are seldom more than special pleaders.[17]

Cox's caution about "special pleader" experts is most noteworthy. It would be difficult to overstate the role of one man's "expert" testimony in the compilation of the *Stenberg* record – the defendant, Dr. Leroy Carhart. The Supreme Court expressed its judgment most tellingly: "the findings and evidence support Dr. Carhart." "The District Court concluded," said this Court, "that 'the evidence is both clear and convincing that *Carhart*'s D&X procedure is superior to, and safer than, the . . . other abortion procedures used during the relevant gestational period in the 10

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[17] A. Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cinn. L. Rev. 199 (1971).

to 20 cases a year that present to Dr. Carhart.'"[18] "The District Court made no findings," this Court added, "about the procedure's overall safety."[19] The record contained evidence of no "controlled medical studies that would help answer" the question of medical necessity.[20]

This Court stressed repeatedly in *Stenberg* the uncertainty of medical opinion about the safety of partial-birth abortion, an uncertainty which itself became the reason for the Court's judgment: "the uncertainty means a significant likelihood that those who believe that D&X is a safer abortion method in certain circumstances may turn out to be right."[21] *This* is the *Stenberg* Court's independent judgment about medical necessity: we simply do not know if there is a medical necessity. Right now there is a division of opinion, this Court can be heard to say. The *Stenberg* Court did not, in other words, find facts. The Court *appealed* for facts. The Act responds to that appeal.

The record upon which this Court relied in *Stenberg* was compiled in 1997-98. The record consisted of data and experiences older than that. That record contained "medical authority" (which the Court described as "significant") indicating that partial-birth might be the safest abortion procedure in some circumstances. But the Court never said that these authorities were *right*. The Court said that the opinion expressed in those authorities – that partial-birth abortions was sometimes safest – was not *proved wrong* by the state of Nebraska.

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[18] 530 U.S. 914 at 928-29.

[19] *Id.* at 928.

[20] *Id.* at 936.

[21] *Id.* at 937.

Thus, this Court's holding in *Stenberg* does not preclude the Court from giving due deference to Congress' finding of fact in the Act.

III. Courts Should Defer to Congress' Finding That Partial-Birth Abortion Bears a "Disturbing Similarity" to Infanticide, Which Similarity "Promotes A Complete Disregard For Infant Human Life."

Congress judged the following proposition to be true: there is a "disturbing similarity" between partial-birth abortion and "killing a newborn infant," which similarity "promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure."[22] Congress advanced this proposition as the fruit of the same "extensive legislative hearings during" three separate Congresses as was its negative finding on medical necessity. The proposition about newborns' lives is much more the type of judgment which Archibald Cox and this Court many times have identified as peculiarly well-suited to be made by Congress. After all, "medical necessity" involved a finite number of individual cases, each one of which was a confined, medical-scientific problem with (even the Eighth Circuit admitted) one right answer. The proposition about danger to newborns is much more unwieldy and intractable. It is an open question with many interrelated moving parts. It is predictive in a way the medical question is not. The proposition about newborns straddles many disciplines and areas of investigation; it is a large bore prediction about the broad sweep of

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[22] 117 Stat. at 1206.

human behavior. But one thing is certain: Congress is much better positioned and considerably more likely to get the right answer to this question than is any court.

As this Court said in *Turner II*, the Supreme Court "owe[s] Congress' findings deference in part because the institution 'is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon' legislative questions."[23] In *Katzenbach v. Morgan*, this Court said that it "was for Congress . . . to assess and weigh the various conflicting considerations . . . . It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."[24]

In fact, the proposition about danger to infants is similar to that to which this Court deferred in *Turner I* and *II*.[25] Those cases involved Congress' finding that, without mandatory cable carriage rules, the future of local broadcast television was "seriously jeopardized." That judgment was, like the judgment in the Act, debatable and not without its detractors. Indeed, the Act's finding could be expressed in similar language: "without prohibiting partial-birth abortion the future viability of legal protections of newborns would be jeopardized." This Court deferred to Congress on the matter of broadcast television. It should do so on protecting the lives of infants.

Is there anything in this Court's abortion jurisprudence which would justify disregarding what Congress has

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[23] *Turner Broadcasting System v. FCC*, 520 U.S. 180, 195 (1997) (quoting *Turner Broadcasting System v. FCC*, 512 U.S. 622, 666-67 (1994)).

[24] 384 U.S. 641, 653 (1966).

[25] *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994).

found? Someone might object that *Roe v. Wade* itself invalidates the Act so long as it contains no "health" exception. But this objection is obviously mistaken. *Roe* expressly excepted from its holding the Texas parturition statute, which made it a crime to "destroy" a "child in a state of being born and before actual birth."[26] This criminal prohibition undoubtedly included what we call today "partial-birth abortion." *Roe* might be read in any event to require a life-of-the-mother exception to any ban of partial-birth abortion. The Act has one.

The *Roe* Court made abundantly clear in more fundamental ways than distinguishing parturition that the "abortion" liberty did not extend to destruction of a child being born. The *Roe* Court created a right to an "abortion." The opinion equated "abortion" with the "termination of pregnancy."[27] Nowhere did the *Roe* Court say, imply, or even hint that "abortion" might refer to the termination of a child who had been evacuated from the womb and had been delivered through the birth canal. This reticence is telling especially because the Court's attention was directed to that possibility by the Texas parturition law.

Stenberg v. Carhart held, of course, that the abortion liberty includes a "health exception" to a ban on partial-birth abortion. But according to the very same authorities relied upon in *Stenberg*, the Act's protection of children being born distinguishes them from victims of "abortion." Webster's Third Edition, cited as authoritative in *Stenberg*, defines "birth" as "the act of coming forth from the

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[26] 117 Stat. at 1205 (referring to 410 U.S. at 117, note 1).

[27] *See, e.g.*, 410 U.S. 113, 140.

womb," "the emergence of a new individual from the body of its parent." "Pregnant" is defined as "containing unborn young within the body," "preparing to bring forth" an unborn individual. *Maloy's Medical Dictionary for Lawyers* defines pregnancy as "the state of being with young; preparing to bring forth"; "birth" is "the act of coming into life, or being born." The *Oxford-English Dictionary* (2nd edition) defines "birth" as "the bearing of offspring"; "bringing forth." "Pregnant," according to the *OED*, is "with child or young."

These authoritative sources make clear that "abortion" refers exclusively to terminating a "pregnancy." One way to "terminate a pregnancy" is to have an "abortion." Another way is to give "birth." Women undergoing partial-birth abortions are giving birth.

Stenberg opined that the Nebraska law "does not directly further an interest 'in the potentiality of human life' by saving the fetus in question from destruction, as it regulates only a method of performing abortion."[28] But Congress is here not seeking to protect "potential life." Congress seeks to protect infants, newborns, that is, human individuals whom everyone acknowledges to possess a right not to be killed. The statement from *Stenberg* about "potentiality" is therefore inapposite. The narrow sense in which it is true is the following: by prohibiting abortions during birth the Nebraska law does not necessarily save any child, for the woman may still procure an abortion by means of destruction *in utero*. But the Act means not to protect some "potential life," but infants. The Act says in effect: *no* child who has emerged from the

[28] 530 U.S. at 930.

womb and is in the process of being born may be killed. *That* act – the act of killing a baby nearly born – is the mischief to be defeated, along with its promotion (in ways explored in Part V of this Brief) of infanticide.

IV. This Court Ought to Uphold Congress' Judgment That A Health Exception Would Endanger Infants' Lives.

What, then, about the constitutionality of Congress banning partial-birth abortion, save for where the procedure is needed to save the woman's life?[29]

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[29] In some places, the Act reads as if Congress has declared that the victims of a partial-birth abortion *are* infants. Your *amici* agree with the proposition thus attributed to Congress, and would argue in favor of the constitutionality of such a law. But we do not here suppose that reading of the Act. Nothing in the argument presented in the text of this brief supposes or implies that partial-birth abortions kill infants. (Again, we believe this to be, in fact, the case.) The relevant premise of the argument here is that "infants" are those children who are completely evacuated from the woman's body, and are thus "born."

It is important to note, however, that Congress not only *could* but *has* determined that people begin at conception. We refer here to the Unborn Victims of Violence Act, which effectively holds that as to the whole world save for the pregnant woman and those cooperating with her in her voluntary abortion, persons deserving the equal protection of laws against killing begin at conception. Many states have enacted similar "feticide" laws. As far as your *amici* are aware, none has ever been deemed unconstitutional.

The reason is clear enough. Some people seem to think that this Court in *Roe*, or in some other case, held that until children are born they are *not* human beings with a protectable right not to be killed. But the Court has never so held. The *Roe* Court said that it did not "need [to] resolve the difficult question of when life begins." 410 U.S. at 159. The Court there said "the judiciary . . . is not in a position to speculate as to the answer." *Id*. In no general or broad way, moreover, did the Court hold that the states of the Congress operated under a similar disability. All that the Court held in this regard was that Texas (and

(Continued on following page)

It will not do to say that the Act is unconstitutional because it abridges the abortion liberty. The question is: what exactly are the boundaries of that liberty? The question is not whether some women have an interest[30] in partial-birth abortions. They do. Congress did not deny that some women have such an interest. The question has nothing whatsoever to do with "big brother" government. Nothing in the Act smacks of paternalism, as if Congress were second-guessing from the woman's point of view the wisdom of her choice. It is just that Congress judges that choice to be dangerous to *others*. Congress identified those who are endangered as not only the victims of partial-birth abortion but newborns generally. The question is whether this Court ought to declare squarely, for the first time now on a full record and in the face of an authoritative

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thus any other governmental body, including for argument sake, the Congress) could not "override the rights of the pregnant woman" by adopting an answer to the question of when life begins. *Id.* at 162.

This understanding of *Roe* was explicitly confirmed by the Supreme Court in the 1989 *Webster* decision. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). There the state of Missouri had legislated that the "life of each human being begins at conception," and the "[u]nborn children have protectable interests in life, health, and well being." 492 U.S. at 504. The Eighth Circuit Court of Appeals seems to have adopted the view of *Roe* stated as an "objection" here, that the state had, in light of *Roe*, "impermissibly" adopted a "theory of when life begins." But, the Supreme Court reversed this part of the Eighth Circuit holding, stating that its own prior decisions, including *Roe*, meant "only that a state could not justify an abortion regulation *otherwise invalid under Roe v. Wade* on the ground that it embodied the state's view." 492 U.S. at 506.

[30] Note that "interest" here simply means that some women have a desire for the procedure. Recognizing such an "interest" does not imply any favorable judgment of that desire. "Interest" is entirely a non-evaluative term.

Congressional directive to the contrary, that there must be a "health exception" to any ban on partial-birth abortion.

Here is exactly where the Eighth Circuit's handling of the case disintegrates. That court opined that when there is no "consensus" in the medical community "the Constitution requires legislatures to err on the side of protecting women's health."[31] This missing "consensus" had wholly to do with the women's interests; the health of newborns was nowhere considered. The Eighth Circuit did not consider what Congress said about danger to infants, "blurr[ing] of the line," or any other aspect of the overriding factual declaration in the Act: banning partial-birth abortion is necessary to promote respect for the lives of all infants. For this reason alone, we say that the Eighth Circuit never engaged the issue at hand.

The question is not whether one constitutional right – the woman's to an abortion – may be sacrificed to another – that of newborns' to life. This is not a case in which some settled holding of this Court is to be rolled back. In this case, the question is whether to conclude that women have a right to partial-birth abortion where – according to the authoritative judgment of Congress – such recognition would promote infanticide. The answer is, no.

This statement of the issue allows us to see that the way this Court resolved another constitutional "life" issue, – the putative right to assisted suicide – is instructive. The case was *Washington v. Glucksberg*.[32] The state of Washington prohibited all suicides. This Court took it for granted

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[31] 413 F.3d at 796.

[32] 521 U.S. 702 (1997).

that competent individuals who wish to end their lives have a liberty "interest" (in the non-evaluative sense described above) in doing so. So, too, in that sense, do some women have a liberty interest in partial-birth abortions. *Glucksberg* held that nothing in our legal tradition warranted the elevation of that interest to the heights of a "fundamental right." And so, too, here. But, here there is only indirect support for that claim in a single case of very recent vintage – *Stenberg v. Carhart*. That one holding is far too slender a reed on which to hoist a conclusion that there is a "fundamental right" to an act which is "inches from infanticide." Here, as in *Glucksberg*, the government need only show that the challenged law has a rational basis.

The most instructive parallel to *Glucksberg* is the strategic use made there by this Court – and here by Congress – of a "slippery slope" argument (the Court's term, not ours).[23] Make no mistake about it: *Glucksberg* stands for the proposition that constitutional rights are not deduced as if in a classroom exercise. They are not discovered in the rarified air of philosophy. They are not corollaries of what some people want, even if they want it very badly. Rather, *Glucksberg* held that courts should consider the whole social matrix surrounding the exercise of any putative right (there, assisted suicide), and consider all the foreseeable consequences of recognizing the asserted interest to be a constitutional right. This Court in *Glucksberg* was most concerned about third parties who might suffer uninvited harm. It was a central criterion of

[23] *See* 521 U.S. at 732-34.

deciding whether to recognize a new constitutional right, or not.

In *Glucksberg*, the state expressed fear that permitting assisted suicide "will start it down the path to voluntary and perhaps even involuntary euthanasia."[34] This Court recognized the relevance of such "slippery-slope" arguments, not to defeat a genuine constitutional right, but to help the Court to determine whether such a right exists. This Court endorsed Washington's concern that the only way to protect vulnerable, terminally-ill, and disabled patients who do *not* wish to die is by a categorical prohibition of all physician-assisted suicide. This Court upheld a total ban of assisted suicide because, in part, it would spill over to and endanger some innocent and helpless people.

Glucksberg may best be understood on these lines (and here your *amici* submit an interpretation faithful to what the Court said, not necessarily an account of what the Court's members were thinking): while some persons may have a *prima facie* right to assisted suicide, states may deny its exercise even to them – and to everyone – if it is deemed necessary to protect the lives of innocent persons in the path of the real-world exercise of that right. Recognizing new constitutional rights has to do therefore with considering all of the consequences, doing so under modern social conditions, and with all the temptations and imperfections of persons and social structures.

The *Glucksberg* Court did not "weigh exactly" the strength of various interests promoted by the parties in that case. "They are unquestionably important and legitimate,

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[34] *Id.* at 732.

and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection."[35] So, too, is the Act enacted by Congress in this case.

V. It Is Easy to "Perceive a Basis" for Congress' Findings that Permissive Partial-Birth Abortion Laws Promote Infanticide.

In *Glucksberg*, this Court articulated the standard of review which we assert is applicable to Congress' judgment that partial-birth abortion endangers newborn life. This Court's sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence. As this Court said in *Katzenbach*, "perceiv[ing] a basis" for Congress' judgment is enough. What, then, is the basis for Congress' judgment that banning partial-birth abortion "blurs" the line and thereby endangers newborn life? Why would a health exception be incompatible with that goal?

We take the second question first because it permits a simple two-part answer. The first part is Congress' finding that there is never a medical need for partial-birth abortion. No health need means no health exception. Not even the Eighth Circuit denied that it could "perceive a basis" for this finding.

The second part is Congress' implicit judgment that fairness to newborns requires women with a felt medical need for partial-birth abortion to wait a second longer and give birth. Congress does not say that the woman must sacrifice her other interests in order to raise the child. She

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[35] *Id.* at 735.

may choose to have the baby raised by another. But, Congress found preserving innocent lives is the greater good that must be protected.

What is the basis for Congress' conclusion that permissive laws on partial-birth abortion promote disrespect for newborn life? It is easy to see a basis in the raw physical resemblance of partial-birth abortion to infanticide. In each case an intact infant recently delivered whole through the birth canal is deliberately killed. If one is a protected constitutional right, it is easy to see a "slippery slope" leading to the rationalization, and then to the justification, of the other. This steep incline is captured in the popular description of partial-birth abortion as "inches from infanticide."

These resemblances allow us to see through the legal arguments and asserted medical distinctions to the chilling arbitrariness of the line which the Eighth Circuit drew on the floor of the delivery room. No matter what one's position is on when human beings begin – and even if one has no position – no one supposes that when people begin turns on where ("inches from") one happens to be located. Congress could have – indeed it must have – responded to this challenge. For partial-birth abortion threatens the truth about what makes a person a person by implying that it is about location. However, what makes you a person is something(s) intrinsic, indelible, inherent, inalienable, not where you happen to be.

Here we come to the conscientious legislator's paramount responsibility. The Roman philosopher Justinian said that "[k]nowledge of law amounts to little if it overlooks the

persons for whose sake law is made."[36] Justinian was right: persons *are* the basic realities for which law is called into existence. Law is for *all* persons, not for some persons for whose sake the law might subordinate other persons. It is a characteristic feature – an axiom, really – of modern legal regimes that positive law affects and applies to everyone equally. "Ours is a government of laws, not men," the famous saying holds. This is basically what "equality under law" means.

The most important provision in our fundamental law – the Constitution – is its guarantee to all "persons" of the "equal protection of the laws." All our legal rights and privileges depend on it. None of our rights and privileges would be secure if some people – the stronger or the ones who are able to verbalize their needs and desires – could arrange for other people not to count in law *as* "persons."

Most people need little help from the law to value their own sakes over the fortunes of others, especially those not bound to them by blood or affinity. The allure of manipulating others is eminently understandable. One's life goes easier when one can instrumentalize other persons to one's own projects, ends, goals, needs. Where the law fails to restrain such manipulation, where it sanctions subordination of some for the sake of others, great injustice results. In the wake of injustice comes rationalizations, then later an ideology of inequality. Before long a whole culture of subordination grows up, as

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[36] *Institutes* 1. 2. 12. Justinian said in the *Digest* that "since all law is made for the sake of human beings we should speak first of the status of persons." 1. 5. 2.

feminists and pro-lifers and those who speak for African-Americans have been right to remind us.

People do not need law's help to exploit others. That comes naturally. They need law's help to resist the temptation to take advantage of others. And, as a matter of historical fact, our constitutional guarantee of equality was enacted to deny the patina of legal sanction to slavery and all forms of peonage – to destroy them. The point of having "equal protection" is to forestall the arbitrary exercise of power by one set of persons over another. That seminal guarantee makes sense, though, *only* if the question of who is a person refers to what *is* the case, and not to what we *want*. The force of equality is blunted if the stronger among us can declare the weaker to be "non-persons," and then have their way with them. Again, legal equality is meaningless if who counts as equal is itself a question resolved by strength, or wealth, or special pleading.

It is important here to recall *Roe's* list of practical concerns which make abortion a tempting choice for some pregnant women. The bracketed numbers in the following passage have been added:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. [1] Specific and direct harm medically diagnosable even in early pregnancy may be involved. [2] Maternity, or additional offspring, may force upon the woman a distressful life and future. [3] Psychological harm may be imminent. [4] Mental and physical health may be taxed by child care. [5] There is also the distress, for all concerned, associated with the unwanted child, and [6] there is the problem of

> bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, [7] the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.[37]

Here are the seven interests which the *Roe* court offered to justify the abortion liberty. Of the seven just one – the first – is limited to the condition of *being pregnant. All* of the other six refer exclusively to interests of the woman in *not being a mother.* Almost all of the temptations to abortion are *perforce* temptations to infanticide. They are not eliminated by the legal prohibitions against killing newborns. But giving in to them is a crime. It is of paramount importance that this line against infanticide be kept clear, straight, fortified. If it is blurred, the temptations which the *Roe* Court listed will kick it in like a rotten barrier.

Here is the deeper basis to Congress' reasoning – a woman undergoing a partial-birth abortion has already ended her pregnancy. She is giving birth. It is impossible for her state of mind toward that child to be collateral. Abortions earlier in term could be understood by a woman as intending simply to end her pregnancy. That is the way this Court has invariably described abortion – "termination of pregnancy." A woman whose aim is to stop being pregnant could accept as a side-effect the demise of the unborn child. But a woman having a partial-birth abortion cannot see it that way. Her pregnancy is over.

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[37] 410 U.S. at 153.

A woman undergoing a partial-birth abortion cannot be seeking to avoid the comparatively greater dangers or traumas of giving birth, either. She *is* giving birth. According to all accounts of partial-birth abortion, once labor is induced and the baby is exposed to the abortionist, it would be quicker and easier and healthier for the woman to go ahead and deliver the baby than to have the baby's head punctured, its brains sucked out, and in that way killed – all while the baby's head is lodged somewhere inside the birth canal.

So, in the case of partial-birth abortion the baby's death cannot be a side effect of any choice whose object is, strictly speaking, *either* to end a pregnancy *or* to avoid the dangers of the birth process itself.

We can see, too, that the woman having a partial-birth abortion is also inches away from being free of the other interests cited by the *Roe* Court. There are non-lethal possibilities for childcare: adoption, foster care, or at least of seeing to it that the baby's care is transferred to someone else. Saying nothing here to deny the emotional and psychological trauma most parents would feel to give up a baby, and saying nothing to deny that women doing so experience regrets – it is still undeniably the case that, in the case of partial-birth abortion, the woman cannot be acting with the precise intention to avoid the burdens of being a mother. For she could obtain the same result *without* sacrificing the child's life. She may well be motivated finally or ultimately by the desire to avoid maternal responsibilities. But she chooses a lethal means. She chooses to kill.

The point is that partial-birth abortion *necessarily* involves homicidal intent of the most grave sort. In every

case the woman has to intend and choose that the baby *not exist,* that her child be *dead.* Even if this choice is the means to some further end, it is still a *chosen* means. *This* is the overriding similarity to infanticide. Neither spatial ("inches") nor temporal ("seconds") images capture it well. It is best to describe partial-birth abortion as *tantamount* to infanticide. And it is best to understand Congress to have decided that newborns are endangered where an act tantamount to infanticide is deemed to be a prized constitutional right.

Thus, this Court should defer to Congress' finding that partial-birth abortion is too close to infanticide, and the Act should, therefore, be upheld.

CONCLUSION

The judgment of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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